Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C 20554

In the Matter of	)	
	)	
Examination of Current Policy	)	GC Docket No. 96-55
Concerning the Treatment of	)	
Confidential Information	)	
Submitted to the Commission	)	

REPLY OF SBC COMMUNICATIONS INC.

Several Comments filed in this docket focus on Local Exchange Carrier (LEC) cost data submitted with tariff filings. SBC Communications Inc. (SBC)[1] submits that such data need no longer be filed. Predictably, however, MCI and Time Warner argue that LEC cost data should always be made public. Although MCI, Time Warner and others may sometimes have concerns regarding costs, requiring LEC cost data to be made public is not the appropriate way to deal with those concerns.

Requiring the filing of extensive cost data represents a remaining umbilical cord to rate of return regulation. Cost support requirements were relevant in a rate of return arena in which revenues could not exceed the revenue requirement. In a price cap environment, however, revenues generated by a new service do not require a balancing with existing services. Price cap LECs, if the Commission should continue to require cost support, should only be required to demonstrate that

[1] SBC Communications Inc. files on behalf of its subsidiaries, Southwestern Bell Communications Service, Inc. (SBCS), Southwestern Bell Telephone Company (SWBT) and Southwestern Bell Mobile Systems (SBMS).

proposed rates exceed costs. In any event, public disclosure of cost information is not required to fulfill this objective.

With the passage of the Telecommunications Act of 1996 (new Act), Congress has expressed its intent that market forces govern the telecommunications industry, not intrusive regulation. Requiring LECs to file extensive cost data with tariffs, and further requiring that such data be made public, is no longer necessary to ensure reasonable prices The market will do that. Requiring LEC cost data to be made public, however, will give an inordinate business advantage to MCI, Time Warner and other competitors of SBC.

I. COST SUPPORT IS NO LONGER NECESSARY.

Recently, the Commission's Tariff Division was renamed the Competitive Pricing Division. The name change symbolizes the shift in emphasis from regulated tariffs to competitive market-based pricing brought about by the new Act. Under rate of return regulation, which was utilized by the Commission to carry out the Communications Act of 1934, all carriers were required to file tariffs which controlled prices. The Communications Act did not require cost support to be filed with tariffs, but Commission Rule 0.455(b)(11) did

When LECs were the sole providers of local exchange and exchange access services in their authorized territories, making cost support data available for public inspection may have been a reasonable approach in establishing reasonable rates. It is reasonable no longer.

Competition already exists for many LEC services, and negotiations are in progress to allow any number of carriers to resell SWBT's local exchange service in what was formerly SWBT's

exclusive serving area. The services contemplated by these negotiations will be provided pursuant to contracts, as required by Section 251 of the new Act, not cost supported tariffs.

SBC's competitors would be delighted to review the cost data used to price SWBT's services. If one competitor's costs become public, all other competitors have valuable information on which to base pricing and market entry decisions. Those competitors are then equipped to capture the first competitor's customers without risk of response because they know that competitor's price floor in advance. In addition, competitors will have the knowledge to target only the most profitable customers. In the telecommunications market created by the new Act, LEC cost data should not be made available to other competitors, any more than other competitors' cost data should be made available to LECs.

LECs should no longer be required to support tariff filings with cost data. Competition will ensure reasonable prices. Aggrieved parties can still avail themselves of the Commission's complaint process to seek a determination of the lawfulness of any tariff filings. Elimination of the cost support requirement would do more than any other act to maintain the confidentiality of cost information. More importantly, it would eliminate the need for protective orders, with their attendant controversies and burdensome processes.

If the Commission does not eliminate the requirement of submission of cost data, then the Commission should amend its rules to state specifically that a carrier's cost data will be presumed confidential. Carriers should not be required to request confidential treatment with each tariff filing, and the Commission should not waste valuable resources addressing each request. Such a procedure would be in concert with Congressional intent and would allow LECs to respond effectively to their

customers, just as their competitors are allowed to do. It would also improve the speed and quality of Commission service to the public.

II. IF THE COMMISSION RETAINS THE COST SUPPORT REQUIREMENT, THE BURDEN SHOULD BE ON THE PARTY SEEKING THE COST DATA TO SHOW LACK OF COMPETITIVE HARM TO THE CARRIER WHICH SUBMITTED THE DATA.

MCI routinely objects to every SWBT non-price cap index-affecting tariff filing, whether or not SWBT requests confidential treatment of its cost data, even when MCI has no intention of purchasing the service. Thus, it is no surprise that MCI's Comments in this docket argue that LEC cost data should never be confidential.

> [I]nformation submitted to the Commission by dominant LECs in support of their tariffs must always be disclosed, since Commission Rules require such information to be publicly available.[2]

This position is inconsistent with Exemption Four of the Freedom of Information Act, which shields from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[3] Thus, MCI's approach should be summarily dismissed.

Of course, if the Commission would eliminate the filing of cost support, this issue would be moot. If the Commission chooses to retain the cost support requirement, however, the real question, one which MCI does not discuss, is how the Exemption Four standard should be applied.

Generally, in determining whether material falls within Exemption Four, the so-called National Parks test is applied:

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[2] MCI at 14-15.

[3] 5 U.S.C. §552(b)(4).

> [C]ommercial or financial matter is "confidential . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[4]

This test was subsequently modified by Critical Mass Energy Project v. N.R.C.,[5] which held that financial or commercial information provided to the Government on a "voluntary" basis is confidential under Exemption Four "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."[6] Under Critical Mass, the issue of competitive harm does not arise. The key issue is whether the submitted information is voluntary.

If the Critical Mass test were to be applied to SWBT's tariff filings, cost support would remain confidential, because SWBT generally does not release such information to the public, and most SWBT tariff filings would be considered "voluntary." SWBT is normally not required to file tariffs, any more than the nuclear industry group in Critical Mass was required to file the safety reports which were the subject of the FOIA request. In most instances, SWBT files a tariff only when and if it wants to, not because the FCC requires it.

Even if the National Parks is applied to SWBT tariff filings, however, cost support would still be subject to Exemption Four, because release of that data would cause SWBT substantial competitive harm. The Competitive Pricing Division has already recognized this by granting confidential status to SWBT cost support in several recent tariff filings.[7]

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[4] National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

[5] 975 F.2d 871 (D.C. Cir. 1992).

[6] Id. at 879.

[7] Transmittal No. 2453, Order of August 25, 1995; Transmittal No. 2525, Order of

(continued...)

General Communications, Inc. (GCI) argues that the burden of proof, when applying the National Parks test, should be upon the LEC to demonstrate competitive harm.[8] Such a requirement, however, is both unnecessary and time-wasting. In the wake of the new Act, all cost support data of all carriers should be presumed confidential.[9] Carriers requesting access to LEC cost information should be required to demonstrate that release of that information will not cause the LEC substantial harm. If LECs must continue to justify separately each request for confidential treatment of cost support, then LEC tariff filings will continue to be voluminous, and the Commission staff will be forced to waste valuable time and resources to review reams of documents to determine if the LEC has proved the obvious: the local exchange market is now open to competition.

The Commission should place the burden of proof upon the party wishing to examine cost data. That party should be required to demonstrate lack of competitive harm to the LEC which submitted the data. Absent such a showing, cost support data--if the Commission decides to continue to require it--should remain confidential, and the Commission should move on to more productive matters.

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[7](...continued)
February 22, 1996; Transmittal No. 2528, Order of February 29, 1996; Transmittal No. 2529, Order of February 29, 1996; Transmittal No. 2531, Order of February 29, 1996; Transmittal No. 2533, Order of March 20, 1996; Transmittal No. 2547, Order of June 21, 1996 and Transmittal No. 2552, Order of June 21, 1996.

[8] "[T]he Commission should require specific information that substantiates a party's confidentiality claim." GCI at 12.

[9] Indeed, in competitive markets, release of cost data is generally an antitrust violation.

III. THE MODEL PROTECTIVE ORDER IS DEFICIENT.

If the Commission eliminates the requirement of cost support with tariff filings, or even eliminates the requirement that it be made publicly available, protective orders will be unnecessary. If confidential cost information is still required to be filed, however, then appropriate protective orders will be necessary. Protective orders are effective only if they afford the level of protection required by specific categories of confidential information If they do not, such orders confer an undue and unreasonable competitive advantage upon the requesting party.

Time Warner generally favors the model protective order contained in the NPRM and would broaden its scope to allow use of the information disclosed in other proceedings.[10] Time Warner even suggests that the Commission incorporate the order into the national guidelines to be established by the Commission pursuant to Section 251(d) of the new Act.[11]

The model protective order, however, fails to recognize that different types of information should be afforded different levels of confidentiality. Moreover, the model order is written as though no competitor would ever seek confidential information for business advantage. State commissions long ago realized that competitors employ discovery in regulatory proceedings for business advantage. That is why the protective orders employed by Texas, and the other states in which SWBT does business, provide various levels of confidential protection.

The Texas protective order, for example, recognizes three categories of protected information: (1) "Confidential Information," (2) "Highly Sensitive Confidential Information," and

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[10] Time Warner at ii and 11-13.

[11] Id. at 11, ftnt. 16.

(3) Highly Sensitive Confidential Information--Restricted."[12] Each category places successively more restrictive limitations on the viewing and use of confidential business information. The third category restricts production and use of confidential business information solely to the Texas Public Utility Commission.

SBC's Comments (page 10) detail several recent breaches of state protective orders in which SBC competitors have improperly used confidential business information produced pursuant to such orders. If the restrictive state protective orders are subject to such non-compliance, the possibility for misuse inherent in the Commission's model protective order is immense. Should the model order be adopted, disputes over document production would be legion, and Commission proceedings would slow to a crawl.

MCI suggests that audit material can be released under a protective order, but this is merely another transparent MCI attempt to gain access to competitors' confidential information.[13] Audit material must be kept confidential. The only time audit material should ever be released is in extraordinary circumstances when the public interest justifies disclosure of a summary of the audit findings. The raw data should never be released, because release would impair the Commission's ability to obtain future audit information.[14]

Any protective order adopted by the Commission must recognize varying degrees of confidential information, and must provide appropriately varying levels of protection. If, however,

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[12] A copy of the Texas Model Protective Order is attached as Exhibit A to SBC's Comments.

[13] MCI at 13-14.

[14] Audit information is specifically exempt from public disclosure under FOIA Exemption Four. 5 U.S.C. 552(b)(4).

the Commission will simply eliminate the requirement of cost support submissions with tariff filings, protective orders will not be necessary.

IV. CONCLUSION

With the passage of the new Act, SBC faces increased competition for all its services. Confidential and proprietary business information that SBC could once submit to the Commission under limited protection must now be rigorously protected.

Clearly, Congress intends for competition to replace regulation. The Commission's regulatory duties, therefore, primarily consist in allowing the market to function. Requiring elaborate and public cost support to justify tariff filings may have made sense when LECs provided service to exclusive franchises. Such cost support makes no sense at all under the new Act, which allows many local providers to serve the same areas This new world is evidenced by the Tariff Division name change to Competitive Pricing Division

Cost support for tariff filings should be eliminated. If the Commission does not take that step, then cost support should be presumed confidential and should not be made public unless and until the party seeking disclosure can demonstrate complete lack of competitive harm to the LEC which submitted the data.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Liz Jensen, hereby certify that the foregoing Reply Brief of SBC Communications Inc., GC Docket No. 96-55, has been served this 15th day of July, 1996 to the Parties of Record.

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